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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 218

RUSSELL McMAHON, et al.,
Petitioners

v.

MILAM MANUFACTURING COMPANY
Respondent.

BRIEF OF RESPONDENT ON PETITION FOR WRIT OF CERTIORARI

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BRIEF OF RESPONDENT ON PETITION FOR WRIT OF CERTIORARI

POINT NO. 1

The Picketing was not peaceful.

At the outset, we take issue with the statement of Petitioners as to the question presented in this case. On Page 2 of their Petition, Petitioners, in order to invoke the jurisdiction of this Court, state that this case presents the question of whether a State Court may enjoin peaceful picketing.

This statement is made in complete disregard of the finding of the Chancery Court of Lee County, Mississippi. The decree from which the appeal was taken to the Mississippi Supreme Court is attached as Appendix A to this brief. In that decree, the Chancellor stated:

> "Even if a labor dispute had existed, the picketing was unlawful because it was not peaceful picketing."

This finding of fact by the Chancellor was ignored by Petitioners on their appeal to the Mississippi Supreme Court, and the contention was made in that Court that the decree enjoined peaceful picketing. However, the Mississippi Supreme Court held that this finding of fact by the Chancellor was supported by substantial evidence. The Mississippi Supreme Court stated:

> ". . . this Court is unable to say that there is no substantial evidence to sustain the learned trial court in enjoining the picketing because of coercion and intimidation."

Petitioners are well aware that picketing which is not peaceful may be enjoined by the State Court, and in an effort to wipe out this line of authority with a stroke of the pen, Petitioners ignored the finding of fact by the Chancellor throughout their petition. On Page 4, they state that the picketing was at all times completely peaceful. On Page 6, they state that the decree banned all picketing, and this statement is repeated on Page 7 of the petition and also on Page 9. On Page 10, Petitioners again state that the picketing was "altogether peaceful", and on the same page, they make further reference to a ban on peaceful picketing and a ban on all picketing. The Chancellor specifically found on substantial evidence that the picketing was not peaceful and was, therefore, illegal, and the decree bans illegal picketing.

The finding of fact that the picketing was not peaceful was made by the Chancellor, who heard all of the testimony, observed the witnesses on the stand, judged their credibility and the weight of their testimony. The Chancellor found both in the opinion and in the decree that the information

conveyed to the public by the pickets was false and was a complete misrepresentation of the actual facts. The sign carried by the first group of pickets informed the public that Milam employees were on strike. All of the witnesses testified that Milam employees were not on strike, and there was actually no dispute between the company and its employees. Each of the pickets who carried this sign testified that they knew the information was incorrect. The sign carried by the second group of pickets was also completely misleading and a misrepresentation of fact. The information on this sign was intended to convey to the public that Texson was using the facilities of Milam Manufacturing Company as a means of breaking the strike at its own plant. The testimony revealed to the contrary, and in his opinion the lower Court found, from the proof, that Milam had devoted ten to twelve per cent of its total production to doing work for Texson over a period of years. That this work was on a cut, make and trim basis, and was carried on without supervision from Texson. That there was no other relationship existing between the companies. That the garments made by Milam for Texson were never made at its San Antonio plant, and that the volume of the work done by Milam had not been increased to take on any work which had been performed at the strike-bound plant. These findings of fact are fully supported in the testimony of L. G. Milam and the testimony of A. R. McConnell. In addition to the misrepresentation of facts, there was evidence that trucks were stopped (R. 190), and all shipments to the plant were stopped. (R. 218) There was evidence that the pickets made a practice of following any trucks which either made a delivery or picked up a shipment. (R. 189, 190, 191, 197, 219, 220) In one instance, the driver became so frightened that he asked for an escort away from the plant and then found that his truck was being followed by two

of the pickets. This following continued past Fulton, Mississippi, more than twenty miles away, at which time the driver was so fearful for his safety that he requested a State Highway Patrol escort, both from the State of Mississippi and the State of Alabama. (R. 191, 192, 199, 200, 201) There was also evidence that the driveway to the plant was blocked and the owner of the truck which was blocked in the drive asked for a police investigation of the matter. (R. 222, 223, 249) The Record plainly shows that the great weight of the evidence supports the factual finding of the Chancellor that the picketing was not peaceful. However, Petitioners seem to think that any picketing which is not accompanied with actual physical violence is peaceful.

Many Courts have held that such is not the case. In 70 C.J.S. Page 72, it is stated:

> "In peaceful picketing there is an entire absence of fraud, violence or anything of an intimidational nature, and it is characterized by peaceful persuasion for the promotion of a lawful purpose."

In the case of Senn. vs. Tile Layers Protective Union, 301 U.S. 468, 57 S. Ct. 857, 81st L. Ed. 1229, this Court was considering the words, "peaceful picketing", as contained in a Wisconsin statute. This Court said:

> "That terms as used implies not only absence of violence, but absence of any unlawful action." This Court further said: "The picketing was peaceful; the publicity did not involve a misrepresentation of fact."

Petitioners have chosen to define the picketing in the instant case as peaceful rather than following the finding

of fact of the lower Court. Petitioners have not cited one case which holds that the picketing carried on in the instant case as described in the finding by the lower Court was peaceful.

In the case of Gomez vs. United Office and Professional Workers, 73 Fed. Sup. 679, the District Court for the District of Columbia held that the use of misleading statements by pickets constituted a method involving fraud and could, therefore, be enjoined.

In the case of Cafeteria Employees Union, Local 302 vs. Gus Angelos, et al, 320 U.S. 293, 88 L. Ed. 58, false representations and acts of coercion were held not protected by the Constitution. This Court stated:

> "In a setting like the present, continuing representations unquestonably false and acts of coercion going beyond the mere influence exerted by the fact of picketing, are of course not constitutional prerogatives."

The New York Court has defined peaceful picketing in the following cases: Triangle Finishing Corporation vs. Textile Workers Union, 145 New York Sup. 2d 614, Mel-Tex, Inc. vs. Livingston, 145 New York Sup. 2d 864. The Supreme Court of Mississippi, in referring to the action of the pickets in the instant case, stated:

> "The Appellants in this case, pursuant to their purpose and intention to "hatch up" a connection between Milam and Texson, perpetrated a great fraud upon Milam when they paraded before its entrances with signs which announced, 'Texson—Milam Manufacturing Company on Strike'."

We respectfully submit that the question presented on the Petition for Certiorari is whether this Court will review the decision of a State Court where there is a direct finding that the action of the pickets constituted a fraud and that the picketing was not peaceful. We respectfully submit that the right of the State Court to enjoin such picketing is so well established that it does not require review by this Court.

In the case of Milk Wagon Drivers Union vs. Meadowmoor Dairies, 312 U.S. 287, 61 S. Ct. 552, 85 L. Ed. 836, this Court considered a case in which the Supreme Court of Illinois affirmed an injunction against picketing. In that case, the importance of the finding of fact by the State Court was recognized in these words:

> "We have not only his findings but his findings authenticated by the state of Illinois speaking through her supreme court. We can reject such a determination only if we can say that it is so without warrant as to be a palpable evasion of the constitutional guaranty here invoked. The place to resolve conflicts in the testimony and in its interpretation was in the Illinois courts and not here. To substitute our judgment for that of the state court is to transcend the limits of our authority."

In Hotel Employees Union vs. Sax Enterprises, 358 U.S. 270, 79 S. Ct. 273, 3 L. Ed. 2d 289, this Court stated that there was no finding by the Florida Court that the picketing was other than peaceful.

POINT NO. 2

The picketing did not grow out of a labor dispute involving Respondent.

The Chancellor based his jurisdiction on two points, holding that there was no labor dispute and that even if a labor dispute was involved, then he had jurisdiction to issue the injunction because the picketing was not peaceful.

The Supreme Court of Mississippi upheld the lower Court on both grounds. The Supreme Court of Mississippi is familiar with the doctrine of preemption by the National Labor Relations Board in matters involving labor disputes. This doctrine was fully discussed by the Mississippi Supreme Court in the case of Fisher & Allied Workers vs. Quaker Oats Company, 235 Miss. 401, 109 So. 2d 321. The doctrine was followed in that case even though the pickets did not stand in relationship as employees of the company. The cases relied upon by Petitioners were cited in Petitioners' brief in the Mississippi Supreme Court and were duly considered in the lengthy opinion of the Supreme Court in which the cases were differentiated from the facts of the case at bar.

No case is cited by Petitioners going as far as the Court would have to go in this case to hold that the picketing grew out of a labor dispute.

Petitioners recognized that fact and tried the case in the lower Court on the theory that it would be necessary to involve Milam Manufacturing Company in some way in the labor dispute.

In the answer filed to the original bill the Defendants alleged that they had a labor dispute with the Texson Manufacturing Company and that such dispute also existed with Milam Manufacturing Company as the alter ego of Texson. The Defendants sought to show that Milam was involved by having taken over production from the strike-bound Texson plant. The proof showed clearly that the garments which Milam was manufacturing for Texson were the same garments which had been manufactured since 1957 and that the Company had not in fact taken over any production of the strike-bound plant. (R. 128, 176, 177) The proof also showed that sales to Texson in March and April, 1958, totaled $22,000.00 and sales to Texson in March and April, 1959, totaled $19,008.00. (R. 125) Instead of a large increase in business resulting from the strike the record showed that sales had actually decreased and the forecast which was made up to show cutting orders from Texson showed that in April, 1958, cutting orders totaled 27,732 dozen, whereas in April, 1959, cutting orders totaled 21,297 dozen. (R. 216) In other words, there was actually a reduction in sales of completed merchandise and there was also a reduction in cutting orders for future manufacture.

Before the trial on the merits the defendants filed separate answers in addition to the joint answer which was filed at the hearing on the preliminary injunction. In the separate answers defendants stated:

> "This Defendant is informed and believes that the total production by the complainant for and on behalf of the Texson Company is greatly in excess of ten to fifteen per cent; that the major portion of the manufacturing now being done by the complainant is for and on behalf of Texson Company. This defendant is in-

formed and believes that the manufacturing of womens garments by the complainant for the Texson Company has greatly and materially increased from on or about February 23, 1959, when the employees of the Texson Manufacturing Company became engaged in a lawful and legal strike against that said company. This defendant is informed and believes that a substantial portion of the manufacturing facilities of the complainant, at all times mentioned herein, are utilized and devoted to the manufacture of garments for the said Texson Company, and that a substantial number of the approximately 216 persons employed by the complainant are engaged in the production of garments for the Texson Company. This defendant is informed and believes that the complainant's employees are performing work for the strike bound Texson Company, and that substantial portions of the work since February 23, 1959, and now being performed by the complainant for the said Texson Company is work which would otherwise have been done by the employees of Texson who are on strike, and that the complainant at all times mentioned herein knew that there existed a labor dispute and strike between Texson and its employees and knowingly and willingly performed the work of manufacturing garments for the said Texson Company. This defendant charges and avers that the complainant, Milam Manufacturing Company, and the Texson Manufacturing Company are so closely allied as to make the complain herein an "ally" with Texson in the labor dispute existing between Texson and its employees, and that as such the compainant is in the same position thereasto as the Texson Company. That because of said alliance with Texson in the manner set forth herein that the complainant is a party to said labor dispute.

> . . . This defendant charges and avers that the complainant, Milam Manufacturing Company, is engaged in producing and shipping goods in interstate commerce, and that there exists a labor dispute between the complainant and defendants including a controversy concerning terms, conditions of employment and concerning the association and representation of persons seeking to arrange terms and conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employees."

These facts alleged by Petitioners as the basis for a requested holding by the State Court that jurisdiction was vested solely in the National Labor Relations Board were not proven. The facts as shown by the Record and as found by the Court are entirely to the contrary.

In the present Petition, most of the facts set up in the answer as quoted above are omitted, and Petitioners are apparently now relying on the proposition that Milam was a party to Texson's dispute with Texson employees because Milam had through the years done a small amount of work for Texson. It is respectfully submitted that Petitioners cannot set up a state of facts as a basis for action by the lower Court and then, when they utterly fail to prove such facts, adopt some different theory as a basis for action by this Court.

In the case of Gomez vs. United Office and Professional Workers of America, 73 Fed. Sup. 680 cited above, the District Court for the District of Columbia was considering the question of whether picketing grew out of a labor dispute as defined under the Norris-LaGuardia Act. A dispute

existed in New York, and pickets appeared in Washington, D.C. carrying signs which indicated that the plaintiff in Washington was a party to the dispute. The District Court found that the Washington establishment was not a party to the dispute and was helpless to give the laborers any relief. He held that the picketing did not grow out of a labor dispute. The reasoning by the District Judge is entirely applicable to the position which Milam occupied in the present case. Milam was not a party to any of the grievances and was completely helpless to give any relief. In the Gomez case, the Court further stated that freedom of speech as relating to picketing is restricted within a reasonable radius of the area in which the labor dispute has arisen. The Court held that since the dispute was in New York, the District of Columbia was not within a reasonable radius. In the case at bar with the dispute existing in San Antonio, Texas, certainly Tupelo, Mississippi is not within a reasonable radius. The Supreme Court has recognized the area restriction on picketing in the case of Carpenter and Joiners Union vs. Ritters Cafe, 315 U.S. 722, 62 S. Ct. 807, 86 L. Ed. 1143.

The lower Court in this case did not enjoin all picketing, but enjoined illegal picketing. The lower Court held that the picketing in this case was illegal (1.) because it did not arise from a labor dispute to which Milam was a party, (2.) because it was not peaceful.

It is respectfully submitted that either of these grounds was sufficient to give the lower Court jurisdiction. The holding of the lower Court as to each ground is based on a finding of fact which in both instances is supported by substantial evidence. The lower Court was upheld by the Supreme Court of Mississippi as to both grounds of juris-

diction in an opinion which shows clearly that the issues now raised by Petitioners were carefully considered by the Mississippi Supreme Court.

Having based their position that the picketing was peaceful and that it grew out of a labor dispute on lengthy statements of facts which were not proven, Petitioners now want this Court to completely ignore the findings of fact and summarily reverse the decision of the Mississippi Courts. This Court has held a number of times that Certiorari will not be granted to review judgments based solely on question of fact. N.L.R.B. vs. Waterman S. S. Corp. 309 U.S. 206, 60 S. Ct. 493, 84 L. Ed. 704, U.S. vs. Johnston 268 U.S. 220, 45 S. Ct. 496, 69 L. Ed. 925.

CONCLUSION

Since both grounds for the jurisdiction of the State Court rest squarely on findings of fact and are supported by substantial evidence, we respectfully urge that the Writ of Certiorari be denied.

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CERTIFICATE OF SERVICE

I, Charles S. Tindall, Jr., one of the attorneys for Respondent, do hereby certify that I have this day served a copy of the foregoing brief by mailing air mail, postage prepaid, a copy of said brief to the attorneys for the Petitioners at their usual post office addresses as follows: Honorable Morris P. Glushien, 1710 Broadway, New York 19, New York; Honorable Robert Cohn, 1065 Gordon St., S.W., Atlanta 10, Georgia; Honorable Dixon L. Pyles, c/o Pyles and Tucker, 507 East Pearl Street, Jackson 1, Mississippi.

Witness my signature, this the_____day of August, 1961.

Charles S. Tindall, Jr.
Weinberg Building
Greenville, Mississippi

APPENDIX A

STATE OF MISSISSIPPI

COUNTY OF LEE

IN THE CHANCERY COURT THEREOF

JANUARY 1960 TERM

Nos. 15,813 and 15,836

MILAM MANUFACTURING COMPANY

Complainant

Vs.

RUSSELL McMAHAN, et al

Defendants

FINAL DECREE

Be it remembered that on this day came on to be heard the above styled causes, which were consolidated for trial by prior Order of this Court. The cases were heard on Original and Supplemental Bills, Answers thereto, Motion for dissolution of temporary injunction, proof before the Court sitting in vacation, the hearing of the matter in vacation having been agreed to by all parties, and on briefs submitted by counsel for all parties.

And it appearing to the Court that the Defendants, at the time of the hearing of the matter on Motion For

Temporary Injunction, were picketing and causing to be picketed the plant of Milam Manufacturing Company at Tupelo, Mississippi. And it further appearing that there is no labor dispute between the Defendants and the said Milam Manufacturing Company and no labor dispute between Milam Manufacturing Company and its employees. That the picketing does not grow out of a labor dispute in any manner involving the Milam Manufacturing Company and such picketing is therefore illegal.

And it further appearing to the Court that the picketing conducted by the Defendants has misrepresented facts to the public and pickets have carried signs which were known to be false and misleading. That in addition, the picketing has been carried on with implied threats of violence and the actions of Defendants have resulted in many of the carriers of supplies and cloth refusing to make deliveries to Milam Manufacturing Company. That the picketing was designed solely to damage Milam Manufacturing Company, to prevent it from carrying on its normal business operations and irreparable injury would result from the conduct of Defendants. That even if a labor dispute had existed the picketing was unlawful because it was not peaceful picketing.

It is therefore ordered, adjudged and decreed that the temporary injunctions heretofore granted in this consolidated cause be and they are hereby made permanent and the Defendants are hereby enjoined permanently from illegally picketing or causing to be illegally picketed, the plant of Milam Manufacturing Company. It is further ordered that the entry of this Final Decree shall in no wise affect the pending motion to punish Defendants for con-

tempt of court for violation of the injunction, said motion to be disposed of at some future date by proper order of this court.

Ordered, ajudged and decreed, this the 14 day of January, 1960.